

## Ethylene Oxide: Key Decision from Delaware Supreme Court

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In 2021, we discussed how a Delaware federal court weighed in as to whether or not Delaware tort law recognized a viable cause of action based on fear of cancer resulting from Ethylene Oxide (EtO) emissions (holding that it did not). In that decision, Judge Stephanos Bibas rejected a proposed class action suit filed in 2020 against chemical company Croda Inc. premised on the claims of some nearby residents that carcinogenic releases of EtO from a plant in South Wilmington caused them to suffer a fear of developing cancer. The court rejected the proposed class action which alleged that a November 2018 release of more than a ton of EtO from Croda's Atlas Point plant near the Delaware River, which resulted in a seven hour shutdown of the I-295 Delaware Memorial bridge, caused the plaintiffs to fear an increased risk of cancer. Notably, the release also resulted in a fine by state environmental regulators of \$246,000 plus \$16,000 in costs.

Judge Bibas, in dismissing the suit without prejudice, held that the plaintiffs lacked standing because Delaware tort law does not recognize claims based on an increased fear of disease. However, Judge Bibas also noted that the lead plaintiff and the class members could amend the complaint to the extent any of them were able to show any actual physical injury.

On appeal, the Third Circuit examined the question of whether physical illness is required under Delaware tort law to the state Supreme Court, and found that the matter had never been ruled upon in that jurisdiction prior to the Croda action. After the Third Circuit requested the Delaware Supreme Court's help to determine whether residents could sue Croda for allegedly releasing excessive EtO emissions without the residents actually proving that this caused physical illness, the Delaware Supreme Court late last week ruled that individuals put at increased risk of air pollution-related illness due to exposure to toxic chemicals must show physical symptoms of illness before they can claim a legally cognizable injury.

This recent Delaware Supreme Court decision supports the 2021 Delaware federal court's finding that physical symptoms related to pollution (in this case EtO) are necessary in order for a toxic tort lawsuit to be allowed to proceed. The Delaware high court made it clear that for plaintiffs to bring a legally cognizable cause of action they must first demonstrate actual manifestation of physical symptoms. The court explicitly refused to acknowledge a viable cause of action for future risk of illness in the absence of a present injury. Notably, Delaware's neighbors Maryland, Pennsylvania, and New Jersey have gone a different way and allow for suits based on increased risk of illness from pollution.

## Analysis

Nationally, there are conflicting decisions concerning the viability of claims based on fear of developing cancer from pollution releases. We think the Delaware approach is the correct one. Allowing claims to go forward without actual physical injury clogs the courts and unnecessarily burdens business interests. As we have stressed in prior reports, the best litigation outcome for a defendant is litigation that never happened in the first place. Excessive levels of EtO emissions, whether by accident or otherwise, can lead to state and federal fines as well as private lawsuits. Companies that either own or may have responsibility for facilities utilizing EtO must be vigilant about complying with all applicable regulations concerning emissions and strive to make sure that no excessive emissions

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